92-836 (1)

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOHN PELUSO - - - - - - - - Petitioner

versus

ROBERT ALLEN,
CATHERINE ALLEN,
WILLIAM SMITH and
PAMELA ALLEN - - - - - Respondents

Petition for Writ of Certiorari to the Kentucky Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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72 pp

QUESTION PRESENTED FOR REVIEW

Do principles of federalism and the Supremacy Clause of the United States Constitution, Article VI, Cl.2, require the Kentucky Court of Appeals to accept jurisdiction of an appeal from an interlocutory order denying qualified immunity to a 42 U.S.C. Section 1983 police officer defendant, such appeal being one of right in the federal courts under *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), despite the fact Kentucky has not adopted or recognized a general collateral order doctrine.

PARTIES

The petitioner in this Court is former Jefferson County Police Officer John Peluso who was a defendant in the original action, the appellant in the Kentucky Court of Appeals and the petitioner for discretionary review in the Kentucky Supreme Court. The respondents in this court are Robert Allen, Catherine Allen, William Smith and Pamela Allen, plaintiffs in the original action, the appellees in the Kentucky Court of Appeals and the respondents in the Kentucky Supreme Court.

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1. *Ronnie Allen and Catherine H. Allen, et al* v. *Louisville Gas & Electric, et al,* Jefferson Circuit Court Nos. 85CI-01356, 01958, 01959, and 01392, *Opinion and Order,* entered August 12, 1991.
2. *John Peluso* v. *Ronnie Allen, et al,* Kentucky Court of Appeals No. 91-CA-2148-MR, Order Dismissing Appeal, entered February 3, 1992.
3. *John Peluso* v. *Ronnie L. Allen, et al,* Supreme Court of Kentucky No. 92-SC-294-D, Order Denying Discretionary Review, entered June 17, 1992.*

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*It should be noted the lead plaintiff in the style of the consolidated action in the Kentucky Courts has always been Ronnie Allen even though he and two other plaintiffs voluntarily dismissed their claims in May, 1988. Only the four named respondents still have unresolved pending claims in the underlying action.

JURISDICTION

The Kentucky Court of Appeals issued its "Order Dismissing Appeal" on February 3, 1992 (*John Peluso* v. *Ronnie Allen, et al,* Kentucky Court of Appeals No. 91-CA-2148-MR) dismissing John Peluso's appeal from the Jefferson Circuit Court's denial of his summary judgment motion based on qualified immunity and held such appeal was interlocutory and a non-final, non-appealable order under Kentucky law. Similarly, a Motion to Reconsider was denied by the Kentucky Court of Appeals in an Order dated March 30, 1992.

On June 17, 1992, the Kentucky Supreme Court issued an "Order Denying Discretionary Review" in *Peluso* v. *Ronnie L. Allen, et al,* Supreme Court of Kentucky No. 92-SC-294-D.

On September 9, 1992, this Court granted an extension of time to and including November 13, 1992, to file this Petition for Writ of Certiorari (*Peluso* v. *Ronnie L. Allen, et al,* Supreme Court No. A-192, "Order", September 9, 1992).

The jurisdiction of this Court to review this Petition for Writ of Certiorari is invoked under Title 28, United States Code, Section 1257(a) and in conformity with Title 28, United States Code, Section 2101(c) and Supreme Court Rules 13 and 14. Because the Kentucky Supreme Court refused to grant a Petition for Discretionary Review, the Kentucky Court of Appeals February 3, 1991 Order dismissing Officer Peluso's appeal is the final judgment by the highest court of Kentucky in which a decision could be had for purposes of 28 U.S.C. Section 1257(a) jurisdiction by this court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THE CASE

This case involves Article VI, Cl.2, to the Constitution of the United States, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Also involved is 42 U.S.C. Section 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOHN PELUSO - - - - - - - - - *Petitioner*

v.

ROBERT ALLEN,
CATHERINE ALLEN,
WILLIAM SMITH and
PAMELA ALLEN - - - - - - - - *Respondents*

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

May it please the Court:

The pertinent facts which gave rise to the underlying controversy in this matter arise from a criminal investigation initiated by the Jefferson County (Kentucky) Police Department but eventually involved the Federal Bureau of Investigation and the United States Attorneys Office in Louisville, Kentucky.

In December, 1981, Jefferson County Police Department (hereafter "JCPD"), Captain James Black directed then Detective John Peluso[1] to commence an official investigation of the Seventh Street Road area of Shively in Jefferson County, Kentucky, commonly referred to as the "Derby City Strip", based on numerous reports of criminal activity in the area. During the first few months of 1982, Detective Peluso made several low level and medium level drug buys and collected intelligence concerning prostitution in the Derby City Strip area. At about this same time,

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[1]John Peluso is now employed as a Special Agent with the United States Drug Enforcement Agency.

Captain Black became aware the FBI was also conducting an investigation in the Derby City Strip area which involved members of the Allen family, their associates and employees.

Peluso was working under cover as an electrician in the Shively area and was approached by James Allen around August or September of 1982 and asked by him to turn back electric meters at the Lucky Lady, a strip joint owned by James Allen. After discussing the matter with Louisville & Gas Electric officials and being trained in turning back electric meters, Peluso began turning back electric meters at various Allen family owned residences, bars and strip joints in the Derby City Strip area. At each location, Louisville Gas and Electric put up duplicate meters to record the exact amount of electricity being used.

As requested by the Allens, Peluso proceeded to turn back the meters on a monthly basis and was subsequently paid in cash by them for this service. In February, 1983, Robert Allen telephoned Peluso and asked him to turn back the electric meters at two other commercial locations owned by him, the Club New Orleans and the Green Light Lounge.

As a result of these activities, several of the Allen family members and their associates were indicted in federal court on mail fraud charges because the U.S. Mail had been used to receive and pay fraudulently incurred electric bills. It is critical to note that the only witness called by the U.S. Attorney during sessions of the Federal Grand Jury was FBI Special Agent Robert Bortner.[2] Of the four

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[2]For the Court's convenience, Petitioner has included at APP 14a-18a the affidavit filed in the trial court by Richard Dennis the Assistant U.S. District Attorney for the Western District of Kentucky who obtained the referenced indictments in 1983. As can be seen, Mr. Dennis' affidavit briefly summarizes the investigation, how the various indictments were obtained and details the outcome of all the criminal prosecutions.

remaining plaintiffs in the underlying action, Respondents here, none were convicted of any federal crimes.[3]

Thereafter, in four separate complaints, Ronnie L. Allen, Catherine H. Allen, Robert W. Allen, William R. Smith, Frank Allen, Pamela Allen and James Allen, filed complaints in the Jefferson Circuit Court alleging state causes of action and claims under 42 U.S.C. Section 1983 for the violation of their rights under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution. The named defendants, Louisville Gas & Electric, James Black and John Peluso, were alleged to have violated the plaintiffs' rights by maliciously causing their indictment on mail fraud charges in federal court thus depriving plaintiffs of their liberty, injuring their reputations, invading their privacy and causing mental suffering and pain, all in violation of the enumerated Constitutional amendments.[4] All of the complaints were subsequently consolidated in the Jefferson Circuit Court, Sixth Division, and eventually three of the plaintiffs, Ronnie L. Allen, Frank Allen and James Allen, voluntarily dismissed their claims. Further, in December, 1988, an Agreed Order Dismissing As Settled was entered with respect to the Louisville Gas and Electric Company and the plaintiffs' claims against the defendants, Black and Peluso, were reserved.

In April, 1991, Peluso sought summary judgment on all of plaintiffs' claims and asserted, among other arguments, he was entitled to qualified immunity for the plaintiffs' Section 1983 claims. In an Opinion and Order entered on August 12, 1991, the Jefferson Circuit Court denied Peluso's summary judgment motion and stated in pertinent part:

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[3]As can be seen from Mr. Dennis' affidavit, APP. 17a-18a, two of the other defendants, however, either pled guilty or were found guilty.

[4]All four of the complaints were substantially identical in their claims and Petitioner has attached the complaint of Robert W. Allen and William R. Smith, APP. 7a-13a, as an example of the four complaints.

> "Furthermore, there is no showing that the cited Federal authorities regarding immunity for police apply to this State." APP. 4a.

By a Notice of Appeal dated September 11, 1991, Peluso appealed the Jefferson Circuit Court denial of his motion for summary judgment based on the issue of qualified immunity and stated in the notice that qualified immunity is an issue ". . . which defendant is entitled to have reviewed on appeal prior to trial." APP. 19a. The Court of Appeals then issued an order directing Peluso to show cause why the appeal should not be dismissed as having been taken from a non-final, non-appealable order. APP. 21a. A prompt response was filed on behalf of Peluso, APP. 22a-24a, but the Kentucky Court of Appeals eventually dismissed Peluso's appeal in an "Order Dismissing Appeal" entered February 3, 1992. APP. 1a-2a. Acknowledging the Petitioner's argument that federal law applies in a state court Section 1983 action, the Kentucky Court of Appeals held Kentucky's procedural rules governed the appeal and stated:

> This statement is correct only to the extent that federal substantive law controls such action. However, state court procedure governs all actions filed in state court and this court is bound to follow state court rules of practice and procedure. Pursuant to KRS 22A.020(2), this Court "has jurisdiction to review interlocutory orders of the circuit court in civil cases, but only as authorized by rules promulgated by the Supreme Court." Since the Supreme Court has not promulgated any rules allowing for an appeal of this type, this Court has no jurisdiction to hear it. Based on the foregoing, IT IS HEREBY ORDERED on the Court's own motion, that the above captioned appeal be DISMISSED. APP. 1a-2a.

Thereafter, Peluso sought reconsideration of the Kentucky Court of Appeals Order and reiterated his right of appeal under *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985). Further, Peluso argued that state procedural rules could not defeat this right of appeal under the authority of *Felder* v. *Casey*, 487 U.S. 131 (1988). APP. 25a-27a. By Order dated March 30, 1992, the Court of Appeals denied Peluso's Motion to Reconsider. APP. 5a.

Peluso then exercised his final option and sought discretionary review by the Kentucky Supreme Court. APP. 28a-30a. By Order entered June 17, 1992, the Kentucky Supreme Court entered an "Order Denying Discretionary Review", APP. 6a, thus ending Peluso's state court options with respect to his right of appeal from an interlocutory order denying qualified immunity. Petitioner now seeks a Petition for Writ of Certiorari to the Kentucky Court of Appeals pursuant to 28 U.S.C. Section 1257(a). The Petition for Writ of Certiorari is to the Kentucky Court of Appeals because the Kentucky Supreme Court refused to grant a petition for discretionary review and, thus, the Kentucky Court of Appeals' February 3, 1991 Order dismissing Officer Peluso's appeal is the final judgment by the highest court of Kentucky in which a decision could be had for purposes of 28 U.S.C. Section 1257(a) certiorari jurisdiction by this court.

ARGUMENT

PRINCIPLES OF FEDERALISM AND THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE VI, CLAUSE 2, REQUIRE THE KENTUCKY COURT OF APPEALS TO ACCEPT JURISDICTION OF AN APPEAL FROM AN INTERLOCUTORY ORDER DENYING QUALIFIED IMMUNITY TO A 42 U.S.C. SECTION 1983 POLICE OFFICER DEFENDANT REGARDLESS OF THE FACT KENTUCKY HAS NOT ADOPTED A GENERAL COLLATERAL ORDER DOCTRINE.

I. An Individual Defendant's Qualified Immunity in a Section 1983 Action Is a *Substantive* Federal Right.

It is manifest from the Jefferson Circuit Court's August 12, 1991 Opinion and Order denying Officer Peluso qualified immunity that it did not even consider the federal authorities regarding qualified immunity as binding precedent in a state court Section 1983 proceeding. Specifically, the Circuit Court stated on page 2 of its Opinion and Order: "Furthermore, there is no showing that the cited Federal authorities regarding immunity for police apply to this

state." APP. 4a. Thus, the initial and fundamental error of the Kentucky courts in this matter is their abject failure to recognize qualified immunity is an immunity from suit and a substantive federal right enjoyed by individual defendants, whether the Section 1983 action is brought in federal court or state court.

A cursory review of this Court's decisions clearly show Congress intended to incorporate certain common law immunities into the forerunner of 42 U.S.C. Section 1983—Section 1 of the Civil Rights Act of 1871, 17 Stat. 13—such that these historic immunities would survive the broad reach of the civil rights act and provide a substantive federal right to individual defendants in appropriate circumstances. These common law immunities include both absolute and qualified immunity with legislative, judicial and prosecutorial immunity exemplifying the former while police officers, prison officials and executive officers are entitled to qualified immunity.[5]

The seminal case for purposes of the instant analysis as to the substantive nature of qualified immunity from suit enjoyed by police officers in Section 1983 cases is *Pierson* v. *Ray*, 386 U.S. 547 (1967). In *Pierson*, police officers had arrested the plaintiffs for having violated the Mississippi breach of peace statute when they attempted to use segregated facilities at an interstate bus terminal in Jackson, Mississippi. After the plaintiffs prevailed in the criminal actions, they sought civil damages from the arresting officers and the presiding judge pursuant to 42 a U.S.C. Section 1983 in federal court. After a jury verdict

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[5]Judicial immunity from Section 1983 liability has been recognized by this Court almost since the inception of the civil rights action; see, *Bradley* v. *Fisher*, 13 Wall 335, 20 L.Ed. 646 (1872). See, also, *Imbler* v. *Pachtman*, 424 U.S. 409 (1976) (prosecutorial immunity) and *Tenney* v. *Branshove*, 341 U.S. 367 (1951), (legislative immunity) where this Court concluded that Congress "would [not] impinge on a tradition so well grounded in history and reason by covert inclusion in the general language" of Section 1983. *Id.*, at 376.

for the defendants and appeals to the Fifth Circuit, this Court granted the various petitions for writs of certiorari, affirmed the Court of Appeals as to the issue of judicial immunity and examined the immunity of the police officers.

Although denying the police officers absolute immunity like judges and prosecutors, this court, nonetheless, examined the common law with respect to qualified immunity enjoyed by police officers when they act in good faith and with probable cause in making an arrest. Holding such a common law immunity was also an integral part of Section 1983, substantive law, the Court analogized its decision to that in *Tenney* v. *Brandhove, supra,* and rationalized the need for such immunity as follows:

> A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. *Pierson, supra,* at p. 555.

The substantive nature of all immunities and their incorporation by Congress into Section 1983 was explicitly set forth in *Owen* v. *City of Independence,* 445 U.S. 622 (1980). There, this Court examined the issue of whether municipal corporations were entitled to any immunity similar to that enjoyed by legislators, judges, prosecutors and police officers. Although answering in the negative as to municipal immunity, it is critical to note this Court succinctly explained how its prior cases had determined common law immunities were *incorporated* by the 1871 Congress into the substantive law of Section 1983:

> In each of these cases, our finding of Section 1983 immunity "was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler* v. *Pachtman,* 424 U.S., at 421. **Where the immunity claimed by the defendant was well established at common law at the time Section 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act,**

> **we have construed the statute to incorporate that immunity.** (emphasis added). *Owen, supra,* at p. 638.

Thus, it is beyond cavil, that the immunities incorporated into Section 1983, including qualified immunity for police officers, are an integral part of the substantive law enacted by the 1871 Congress. Further examination of this Court's decisions are necessary, however, to show qualified immunity is more than a mere defense to liability but a substantive federal right of immunity from suit when the defendant's actions do not violate the plaintiff's clearly established rights.

While *Pierson, supra,* recognized qualified immunity for police officers, it did not flesh out its parameters. As a result, its application by the lower courts proved cumbersome because the defendant's subjective state of mind at the time the official action was taken was relevant to the immunity entitlement. This Court remedied that problem with its decision in *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982).[6] In *Harlow,* the Supreme Court refined qualified immunity by rejecting the subjective element and held "... government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow, supra,* at p. 818. Thus, qualified immunity became a straightforward question of law based upon the objective reasonableness of an official's conduct by reference to clearly established law at the time of the incident giving rise to the Section 1983 claim. Sub-

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[6]Although *Harlow* involved the qualified immunity of senior aides and advisors to the President of the United States in an action directly under the Constitution, *Harlow* makes it clear the decision was based, in part, on Section 1983 precedents. Indeed, in Footnote 30, 457 U.S. at p. 818, this Court distinctly stated: "it would be 'untenable' to draw a distinction for purposes of immunity law between suits brought against state officials under Section 1983 and suits brought directly under the constitution against federal officials." [citation omitted]

sequent Supreme Court cases held qualified immunity is available "...to all but the plainly incompetent or those who knowingly violate the law", *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986), and only where it is clear to a reasonably well trained and competent officer that the officer's actions violate the law will qualified immunity not be available, *Anderson* v. *Creighton*, 483 U.S. 635 (1987).

The foregoing authorities stand for two very simple propositions: (1) common law qualified immunity for various state officials, including police officers, was incorporated into the substantive law of the Civil Rights Act in 1871, and (2) qualified immunity is a question of law wherein the reasonableness of a defendant's conduct is to be measured by the clearly established law in effect at the time the individual defendant's acts give rise to a Section 1983 claim. Thus, *Harlow* established the substantive legal test for the entitlement to qualified immunity but the evolution of qualified immunity was still incomplete because its immediate appealability as a substantive federal right enjoyed by Section 1983 defendants had not been addressed by this Court. Those specific parameters were resolved by this Court in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1986) when it addressed the United States Attorney General's immunity from suit for authorization of a warrantless domestic security wire tap prior to a decision clearly establishing the unconstitutionality of such wire tap.

Although *Mitchell* denied the Attorney General absolute immunity, this Court applied the *Harlow* standard for qualified immunity and explained the substantive nature of the right as being an *immunity from suit* rather than a mere defense to liability. The Court further noted the qualified immunity doctrine is intended to resolve insubstantial claims on summary judgment and avoid subjecting Section 1983 defendants to the costs and burdens attendant to such litigation including discovery and trial. *Mitchell, supra,* at page 526. Qualified immunity, therefore, is an *entitlement* not to stand trial or suffer the other litigation burdens attendant to it until the legal question

of the defendant's conduct is first determined to have violated clearly established law.

Moreover, the *Mitchell* court determined that denial of qualified immunity is an appealable interlocutory decision under the collateral order doctrine established by *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949) because a trial court's adverse decision on the issue is "effectively unreviewable on appeal from a final judgment." *Mitchell, supra*, at p. 527. This is manifest from the fact the immunity is one from suit, rather than a mere defense to liability, and it is forever lost if the defendant must endure a trial before the immunity issue is examined at the appellate level. Further, consistent with the *Cohen* decision, the *Mitchell* court noted two additional criteria must be met to satisfy the collateral order doctrine. The order must "conclusively determine the disputed question" and, more importantly for the instant analysis, the issue or question determined by the trial court must involve a "*claim of right separable from, and collateral to, rights asserted in the action.*" *Id.*

The *Mitchell* decision constitutes the final piece of the puzzle defining the contours of qualified immunity. *Mitchell* stands for the proposition that qualified immunity is much more than a mere defense and constitutes an immunity from suit. More important, the immunity is a substantive right of the defendant, separable from the rights asserted by the Plaintiff's claims, and an adverse decision on the issue is immediately appealable under the *Cohen* collateral order doctrine.

The foregoing Supreme Court authorities summarize the current parameters of qualified immunity pertinent to the question presented by this Petition for Writ of Certiorari. Basically, those decisions have determined: (1) Qualified immunity for police officers and other state officials was incorporated by the 1871 Congress when it enacted the civil rights law now embodied in 42 U.S.C. Section 1983; (2) qualified immunity is an immunity from suit rather than a mere defense to liability, and; (3) as an immunity from suit, it is a substantive federal right of indi-

vidual Section 1983 defendants separable from the rights asserted by a Plaintiff's lawsuit and, thus, an adverse decision on qualified immunity is subject to immediate appeal or is forever lost to the defendant.

II. Principles of Federalism and the Supremacy Clause Require State Courts to Apply Federal Substantive Law on Section 1983 Immunities to the Exclusion of State Statutory, Case or Common Law on the Same Subject Matter.

As a preliminary matter, it is worthy to note state courts have concurrent jurisdiction over Section 1983 actions; see, *Aldinger* v. *Howard*, 427 U.S. 1, 36 n. 17 (1976) (Brennan, J. Dissenting); *Martinez* v. *California*, 444 U.S. 277, 283 n. 7 (1980); and *Maine* v. *Thiboutot*, 448 U.S. 1, 3 n. 1 (1980). Kentucky has provided a state forum for 1983 actions despite the fact this Court has never held that concurrent jurisdiction by state courts is mandatory under Section 1983. *Scott* v. *Campbell County Board of Education*, Ky. App., 618 S.W.2d 589 (1981). As there is no question Kentucky properly exercised concurrent jurisdiction over the underlying cause of action in this matter, the next issue which must be addressed is whether federal law pre-empts Kentucky law with respect to Section 1983 immunities. Conversely stated, can Kentucky apply state law principles of immunity in derogation of substantive Section 1983 law as determined by this court. This Petitioner argues principles of federalism and the Supremacy Clause of the United States Constitution, Article VI, Clause 2, preclude Kentucky courts from applying Kentucky law rather than federal substantive law when Kentucky courts entertain a Section 1983 lawsuit.

Article 6, Clause 2, commonly referred to as the Supremacy Clause of the United States Constitution, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall

> be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

While the scope and application of the Supremacy Clause has been the subject of a plethora of Supreme Court decisions, its particular application to the scope of immunity available in state court Section 1983 claims can be fairly summarized by reference to two Supreme Court decisions, *Martinez* v. *California*, 444 U.S. 277 (1980) and, particularly, *Howlett* v. *Rose*, 496 U.S. 356 (1990).

In *Martinez*, the survivors of a 15-year old girl murdered by a parolee filed suit in a California state court seeking damages under state law and 42 U.S.C. Section 1983 against the California officials who had made the decision to release the parolee. The plaintiff's Section 1983 action alleged the state official's conduct in allowing the release of the parolee deprived the victim of her life without due process of law and, further, that the California statute granting those officials absolute immunity from liability from any injury resulting from a parole released decision was similarly violative of the Fourteenth Amendment due process clause. This Court had no problem in applying the state immunity statute to the state cause of action but rejected its applicability to the plaintiff's Section 1983 claim by simply stating the California immunity statute did not control the claim despite the fact the 1983 action was asserted in state court. In doing so, this Court referenced pertinent Seventh Circuit law and explained:

> "Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. Section 1983 or Section 1985(3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect, would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. See *McLaughlin* v. *Tilendis*, 398 F.2d 287, 290 (7th Cir. 1968). The immunity claim raises a question of federal law." *Hampton* v. *Chicago*, 484 F.2d 602, 607 (Ca. 7 1973), cert. denied, 415 U.S. 917. *Martinez, supra*, at p. 284, end 8.

Although *Martinez* ultimately determined the plaintiff's claim was not cognizable under Section 1983, such circumstance does not dilute this Court's recognition that state immunity rules are pre-empted by the Supremacy Clause.

A more detailed examination of the Supremacy Clause's application to state created rules of immunity is found in *Howlett* v. *Rose, supra.* In that case, a Florida high school student filed suit in state court under Section 1983 against various local school board officials alleging his Fourth and Fourteenth Amendment rights had been violated when his car was searched on school premises and he was subsequently suspended from classes. In dismissing the plaintiff's Section 1983 action, the Florida courts held ". . . that the availability of sovereign immunity in a Section 1983 action brought in state court is a matter of state law, and that Florida's statutory waiver of sovereign immunity did not apply to Section 1983 cases." *Howlett, supra,* at p. 360.[7] In a lengthy discussion of federalism principles and the Supremacy Clause in relation to Florida's refusal to apply 1983 principles of immunity, this Court found the Florida courts' decision in this regard to be repugnant to the Supremacy Clause.

The *Howlett* Court explained its determination, in part, with the following rationale:

> An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source . . . When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it

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[7]As it was explained in *Howlett,* Florida's statutory waiver of sovereign immunity made the state liable in respondeat superior but provided that no officer, employee or agent acting within the scope of his employment could be held personally liable unless such person acted in bad faith, maliciously or with a wanton and willful disregard of human rights, safety or property. *Howlett, supra,* at p. 361, n. 5.

> spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of [the State] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State. [citations omitted] *Howlett, supra*, at p. 371.

Thus, *Howlett's* flat rejection of the applicability of state notions of immunity in Section 1983 actions brought in state courts clearly established that the Supremacy Clause pre-emptively imposes the federal spectrum of immunity law on state courts. In doing so, the *Howlett* Court reaffirmed Congress' inclusion of certain immunities in Section 1983 litigation and clearly rejected the ability of any state to supplant or extend those immunities by reference to its own historical concepts:

> Respondents' argument that Congress did not intend to abrogate an immunity with an ancient common-law heritage is the same argument, in slightly different dress, as the argument that we have already rejected that the States are free to redefine the federal cause of action. Congress did take common-law principles into account in providing certain forms of absolute and qualified immunity, [citations omitted], and in excluding States and arms of the State from the definition of person [citations omitted]. But as to persons that Congress subjected to liability, individual States may not exempt such persons from federal liability by relying on their common-law heritage. If we were to uphold the immunity claim in this case, every State would have the same opportunity to extend the mantle of sovereign immunity to "persons" who would otherwise be subject to Section 1983 liability. States would then be free to nullify for their own people the legislative decisions that Congress has made on behalf of all the People. *Howlett, supra*, at p. 383.

Principles of federalism and the Supremacy Clause, as explained by both the *Martinez* and *Howlett* decisions, preclude the various states from utilizing state created immunity concepts in Section 1983 actions filed in their courts. Just as these decisions hold the Supremacy Clause pre-

cludes states from incorporating their own concepts of immunity into Section 1983 actions, they are similarly explicit that the determination of Section 1983 immunities must be strictly decided within the parameters of this Court's decisions interpreting congressional incorporation of common-law immunities, including qualified immunity for police officers, into 42 U.S.C. Section 1983. In other words, states are precluded from expanding *or limiting* the scope of immunities provided by Section 1983.

In the instant case, the initial failure of the Jefferson Circuit Court to acknowledge the pre-emptive nature of federal immunity law started the proverbial snowball down the hill. The Jefferson Circuit Court's distinct refusal to acknowledge the controlling nature of federal case law in this area can only be construed as a violation of the Supremacy Clause in the first instance and a prohibited application of state notions of immunity contrary to *Martinez* and *Howlett*.[8] When the instant petitioner sought appellate review of the Jefferson Circuit Court's denial of qualified immunity, the Court of Appeals compounded the trial court's error by summarily dismissing the appeal as an interlocutory order not subject to appellate review under Kentucky law.[9] Petitioner asserts the Kentucky Court of Appeals' refusal to exercise appellate jurisdiction in such a situation is also a violation of the Supremacy Clause.

III. The Kentucky Court of Appeals' Refusal to Hear Petitioner's Section 1983 Qualified Immunity Appeal Renders His Federally Created Immunity Meaningless and, Therefore, Is an Outcome-Determinative Procedural Rule Violative of the Supremacy Clause.

After the Jefferson Circuit Court denied Peluso his asserted qualified immunity under Section 1983 and held, in

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[8]See App. 4a. The Jefferson Circuit Court held:

"Furthermore, there is no showing that the cited federal authorities regarding immunity for police apply to this state."

[9]App. 1a-2a.

effect, federal authority in this regard was not binding on state courts, the Kentucky Court of Appeals summarily dismissed Peluso's appeal as a non-appealable interlocutory order. APP. 1a-2a. Both the refusal of the trial court to accept federal authority on Section 1983 qualified immunity (See Section II of this Petition, supra) and the Kentucky Court of Appeals' dismissal of Petitioner's appeal on the issue violate the Supremacy Clause. Otherwise, Petitioners asserted qualified immunity would be rendered meaningless in state court because the nature of the immunity, an immunity from suit, would be forever lost if Petitioner was subjected to a trial on the merits before the qualified immunity issue could be reviewed on appeal. *Mitchell, supra.* Thus, the Kentucky Court of Appeals' dismissal of Petitioner's appeal, based on the asserted lack of a Kentucky collateral order doctrine, is an outcome-determinative procedural rule which violates the Supremacy Clause because it frustrates Congress' incorporation of qualified immunity into Section 1983.

The decisions of this Court have long held that state statutes or procedural rules applied to federal causes of action entertained by state courts must not frustrate substantive rights granted by Congress in federal statutes. In *Brown* v. *Western Railway of Alabama*, 338 U.S. 294 (1949), this Court examined a Federal Employers' Liability Act (FELA) action brought in a Georgia state court where the state courts had sustained a general demurrer to the complaint and dismissed the action. According to the Georgia courts, the complaint had to be construed in accordance with the state practice requiring the allegations to be interpreted against the pleader. After the Georgia Court of Appeals affirmed the dismissal of the complaint and the Georgia Supreme Court denied certiorari, this Court granted certiorari to the plaintiff on the issue of whether the FELA complaint should be construed in accordance with the right of recovery authorized by federal law or in accordance with Georgia rules of pleading. Although not specifically referencing the Supremacy Clause, it is clear the *Brown* Court relied on principles of federalism when it

determined that Georgia's local rules of pleading were preempted by the right of recovery authorized by the federal statute. In pertinent part, the *Brown* Court stated:

> Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." [citation omitted]. Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved. *Brown, supra,* at pp. 293-294.

In essence, the *Brown* court rejected the argument that local rules of practice and procedure prevail even if they adversely affect a right granted by federal statute. Petitioner would argue such is the case here because the Kentucky rules of practice and procedure with respect to otherwise interlocutory orders ignores the finality of an order denying qualified immunity. As previously noted, *Mitchell* v. *Forsyth, supra,* held such immunity is one from suit and is forever lost if the defendant is forced to suffer the burdens of trial.

Another opinion of this Court pertinent to this issue is *Perez* v. *Campbell,* 402 U.S. 637 (1971). *Perez* involved a conflict between an Arizona statute and the federal bankruptcy laws. An uninsured Arizona motorist was sued in Arizona state court for personal injuries and property damage arising from an accident caused by the uninsured motorist. He and his wife confessed judgment and subsequently filed bankruptcy petitions listing the judgment among their debts. After the bankruptcy court discharged the listed debts, including the judgment, the driver's license of the uninsured motorist and his wife were suspended pursuant to an Arizona motor vehicle safety responsibility statute that calls for such suspension when a judgment against a motorist remains unsatisfied for 60

days. As a result, Perez and his wife sought declaratory and injunctive relief in federal court asserting the Arizona statute requiring the suspension of their licenses conflicted with the federal bankruptcy act and was thus violative of the Supremacy Clause. When the federal district court and the court of appeals upheld a motion to dismiss for failure to state a claim, this Court granted certiorari.

Disregarding two prior Supreme Court precedents that looked to the purpose rather than the effect of state laws in determining the pre-emption issue, the *Perez* Court ruled that a state statute, the effect of which frustrates a federally created remedy, violates the Supremacy Clause *regardless* of the state legislature's purpose in enacting the offending statute. Thus, the Court stated:

> We can no longer adhere to the aberrational doctrine of *Kesler* and *Reitz* that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy - other than frustration of the federal objective - that would be tangentially furthered by the proposed state law . . . Thus, we conclude that *Kesler* and *Reitz* can have no authoritative effect to the extent they are inconsistent with the controlling principle that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause. *Perez, supra,* at pp. 651-652.

While the instant case does not present a state statute, it nonetheless presents a state imposed procedural rule, or lack thereof, which frustrates the "full effectiveness of federal law" with respect to the immunity doctrines Congress incorporated in Section 1983; see, *Owen* v. *City of Independence, supra.* The Kentucky Court of Appeals summary dismissal of Petitioner's qualified immunity appeal because it perceived it to be from a non-appealable, interlocutory order is as much a frustration of federal law as the specific

statutory enactment in *Perez*. In other words, the *lack* of a state procedural process by which the qualified immunity issue can be reviewed on appeal is as much a frustration of federal Section 1983 law as a *specific* statute or rule repugnant to the federal bankruptcy right in *Perez*. Whether by specific enactment or by omission, Petitioner submits the Supremacy Clause was meant to safeguard federal rights where state courts seek to impose state law interpretations to federal claims in a state forum.

More recently, this Court has had another opportunity to revisit the application of the Supremacy Clause within the specific context of a Section 1983 action brought in state court. In *Felder* v. *Casey*, 487 U.S. 131 (1988), the Court examined the issue of whether a Wisconsin notice of claim statute, requiring a claimant to notify a local government entity or officer of the claimant's intent to hold the entity liable for damages prior to any lawsuit being filed, interfered with the remedial purpose of Section 1983 in violation of the Supremacy Clause. Despite the argument the notice of claim statute was nothing more than a procedural rule which did not in any way minimize the ultimate merits of Mr. Felder's Section 1983 claim, the *Felder* Court rejected that rationale and held the Supremacy Clause dictated pre-emption of the notice of claim provision.

Interestingly, the *Felder* Court's primary focus on the notice of claim provision was not with its substantive or procedural nature but the fact it was outcome determinative—i.e., the enforcement of the statute would produce different results depending on whether the Section 1983 action was filed in state or federal court. Thus, it stated:

> First, it demonstrates that the application of the notice requirement burdens the exercise of the federal right by forcing civil rights victims who seek redress in state courts to comply with a requirement that is entirely absent from civil rights litigation in federal courts. This burden, as we explain below, is inconsistent in both design and effect with the compensatory aims of the federal civil rights laws. Second, it reveals the enforcement of such states in Section 1983

> actions brought in state court will frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court. *States may not apply such an outcome-determinative law when entertaining substantive federal rights in their courts.* (Emphasis added). *Felder, supra,* at p. 141.

Later in the *Felder* opinion, the Court returned to the outcome-determinative aspect of the Wisconsin statute and stated that it was a separate basis for implication of the Supremacy Clause in addition to the interference or frustration of substantive federal rights test established by its previous decisions in such cases as *Brown* v. *Western Railway Company of Alabama, supra.* As the Court explained:

> This interference, however, is not the only consequence of the statute that renders its application in Section 1983 cases invalid. In a State that demands compliance with such a statute before a Section 1983 action may be brought or maintained in its courts, the outcome of federal civil rights litigation will frequently and predictably depend on whether it is brought in state or federal court. **Thus, the very notions of federalism upon which respondents rely dictate that the State's outcome-determinative law must give way when a party asserts a federal right in state court.** (Emphasis added). *Felder, supra,* at p. 151.

Indeed, the notions of federalism referenced by the *Felder* Court caused it to analogize the outcome-determinative test with the choice of law approach followed in diversity cases under the doctrine adopted in *Erie Railway Company* v. *Thompkins,* 304 U. S. 64 (1938):

> Just as federal courts are constitutionally obligated to apply state law to state claims, see *Erie, supra,* at 78-79, so to the Supremacy Clause imposes on state courts a constitutional duty "to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected." [citation omitted]. *Felder, supra,* at p. 151.

This "converse" *Erie* doctrine, is critical to the instant case. As Petitioner has demonstrated by various authori-

ties of this Court in Sections I and II of this Petition, there can be no argument that qualified immunity is a substantive right of an individual Section 1983 defendant which was incorporated by Congress into the 1871 Civil Rights Act. The substantive nature of the right is such that *Mitchell* v. *Forsyth, supra,* held the denial of qualified immunity, as an immunity from suit, entitles the individual defendant to an immediate right of appeal lest the immunity be rendered meaningless by forcing the defendant to endure a trial on the merits before appellate review of his immunity claim. Here, there is no question the initial refusal of the Jefferson Circuit Court to follow federal law in determining Petitioner's qualified immunity and the subsequent refusal of the Kentucky Court of Appeals to review that decision constitute application of outcome-determinative Kentucky law producing a different result in state court than would be had in the federal court. The *Felder* decision is crystal clear the Supremacy Clause and principles of federalism, the *Felder* court's "converse" *Erie* doctrine analogy, preclude such an outcome-determinative result.

IV. The Kentucky Court of Appeals Is Not Alone Among its Sister States in Refusing to Review Interlocutory Orders Denying Qualified Immunity and the Conflict Among the State Courts of Last Resort on Such Issue Militates in Favor of This Court Exercising its Jurisdiction.

A review of decisions from the state courts of last resort which have addressed the issue of reviewing interlocutory orders denying qualified immunity to Section 1983 defendants provides a shocking lack of consistency militating in favor of granting certiorari in this case. It is evident this Court's mandate in *Felder* that outcome-determinative substantive or procedural state law in Section 1983 state court litigation will not be tolerated under the Supremacy Clause has been given little heed by the state courts. This is especially true when it comes to the substantive rights of defendants to have their qualified immu-

nity claims adjudicated in conformity with federal law. Some courts have followed the collateral order doctrine, some have not and some have created their own special rules. Petitioner urges the court to end this chaotic treatment of qualified immunity in state court Section 1983 litigation and grant certiorari in this case. For the Court's convenience, the Petitioner will undertake to review a number of state decisions in this regard.

As good a starting point as any is Justice Souter's opinion in the case of *Richardson* v. *Chevrefils,* 552 A.2d 89 (N.H. 1988) which he wrote while sitting on the New Hampshire Supreme Court. Richardson brought a Section 1983 action seeking damages for constitutional violations arising from the placement of his name on a central registry of child abusers. The trial court denied a motion for summary judgment based on qualified immunity and the defendants appealed. In a unanimous decision of the New Hampshire Supreme Court, Justice Souter preliminarily addressed the collateral order doctrine as set forth in *Mitchell* v. *Forsyth, supra,* and determined it should be adopted in New Hampshire.

In *Breault* v. *Chairman of the Board of Fire Commr's of Springfield,* 513 N.E.2d 1277 (Mass. 1987), cert. denied sub nom. *Forastiere* v. *Breault,* 485 U.S. 906 (1988), the Supreme Judicial Court of Massachusetts also entertained an appeal of an interlocutory order denying qualified immunity to defendants but did so based upon a Massachusetts collateral order rule. Although this Court denied certiorari, it does not appear the collateral order rule was an issue.

A more tortured route was followed by the Supreme Court of Minnesota in *Anderson* v. *City of Hopkins,* 393 N.W.2d 363 (Minn. 1986) before it eventually allowed appellate review. In *Anderson,* the plaintiff brought a civil rights action against the City of Hopkins and two of its police officers pursuant to Section 1983 and the individual defendants' motion for summary judgment based on qualified immunity was denied. The Minnesota Court of Appeals dismissed the defendants' appeal as one from an

interlocutory order and the Supreme Court of Minnesota granted defendants' petition for review. After examining the applicable federal authorities of *Cohen, supra,* and *Mitchell, supra,* the Supreme Court of Minnesota determined *Mitchell* ought to be followed but "...without regard to whether it *must* be followed." *Anderson, supra,* at p. 364.

Another case adopting the federal collateral order doctrine to permit interlocutory appeals from the denial of qualified immunity is *Lord* v. *Murphy,* 561 A.2d 1013 (Me. 1989) where the Supreme Judicial Court of Maine refused to grant a motion to dismiss such an appeal based on its interpretation that the federal collateral order doctrine was consistent with Maine's rules of civil procedure. Alabama and Iowa, however, apparently have specific state rules permitting interlocutory appeals and have permitted appeals on a qualified immunity issue; see, *Sellers* v. *Thompson,* 415 So.2d 460 (Ala. 1984) and *Brumage* v. *Woodsmall,* 444 N.W.2d 68 (Iowa 1989).

The Supreme Court of Arkansas, however, has danced with the issue on several occasions and reached different results. In *Jaggers* v. *Zolliecoffer,* 718 S.W.2d 441 (Ark. 1986), the Arkansas Supreme Court held its procedural rule on final, appealable orders applied when a Section 1983 defendant sought review of the trial court's denial of qualified immunity. By 1990, it is apparent the Arkansas Supreme Court, unlike the Kentucky Court of Appeals or Supreme Court, had educated itself and held in the case of *Virden* v. *Roper,* 788 S.W.2d 470 (Ark. 1990), that a Section 1983 defendant *did* have a right of appeal from the denial of qualified immunity. Its confusing explanation was that the qualified immunity claimed by the appellants in *Jaggers, supra,* was based on a state statute and not an immunity from suit under Section 1983.

On the opposite side of the ledger is the appellate court of Illinois in *Pizzato's, Inc.* v. *City of Berwyn,* 523 N.E.2d 51 (Ill. App. 1 Dist. 1988), cert. denied sub nom. *City of Berwyn*

v. *Pizzato's, Inc.*, 489 U.S. 1054 (1989).[10] In a decision practically a mirror image of the Kentucky Court of Appeals opinion in this case, the appellate court of Illinois opined the lack of a collateral order rule enacted by the Supreme Court of Illinois precluded appellate jurisdiction regardless of the manner such appeal would be treated in the federal courts. Similarly, the Ohio appellate courts are disdainful of appeals from interlocutory orders denying qualified immunity in Section 1983 actions. In *Ohio Civil Service Employees Association* v. *Moritz*, 529 N.E.2d 1290 (Ohio App. 1987), the Ohio Court of Appeals applied state procedural rules that a denial of summary judgment is not a final appealable order and dismissed the defendants appeal. It is particularly pertinent to note the *Moritz* opinion rationalized its decision, in part, on the relevant portion of the Erie Doctrine that a state court is not bound by federal procedural rules. Obviously, the Ohio court did not have the benefit of this Court's decision in *Felder, supra*, which, as stated previously, applied a converse Erie rationale to hold outcome-determinative procedural rules of a state cannot interfere with federal substantive rights.[11]

In the past, Texas has been disinclined to review interlocutory orders on the issue of qualified immunity as demonstrated by the case of *Noyola* v. *Flores*, 740 S.W.2d 493 (Tex. App—Corpus Christi 1987). The Texas Court of Appeals noted that only final judgments are appealable under Texas procedural rules and the denial of qualified immunity was not within the four exceptions to that rule. Thus, it dismissed the defendant's appeal from ". . . the

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[10]Unlike the instant matter where Petitioner sought discretionary review by the Kentucky Supreme Court, it does not appear the *Pizzato's* defendants sought review of the Illinois Supreme Court before seeking certiorari in this Court. If not, certiorari jurisdiction under 28 U.S.C. Section 1257(a) was unavailable; see, *Banks* v. *California*, 395 U.S. 708 (1969).

[11]It is noteworthy that a motion to certify the *Moritz* record to the Supreme Court of Ohio was overruled on February 17, 1988 (Case No. 87-2149). *Moritz, supra*, at p. 1290.

trial court's refusal to grant his motion for summary judgment [based on] his federal right to immunity from suit." *Noyola, supra,* at p. 493. Subsequently, however, the Texas legislature amended the Texas Civil Practices and Remedies Code in 1989 to specifically permit a government employee an interlocutory appeal on any order denying summary judgment based on official immunity. Apparently, the Texas legislature recognized that, like its federal counterpart, the immunity is one from suit and the grant of immunity is effectively lost if the immunity determination is made only after a trial on the merits; see, *Travis* v. *City of Mesquite,* 830 S.W.2d 94, 102 N.4 (Tex. 1992).

In *Klindtworth* v. *Burkett,* 477 N.W.2d 176 (N.D. 1991), the Supreme Court of North Dakota specifically examined application of the Supremacy Clause and the *Felder* opinion and still reached the conclusion that the denial of a motion for summary judgment based on qualified immunity in a state court Section 1983 case was not subject to immediate appeal. Consistent with some of the courts of its sister states whose opinions have been cited above, the North Dakota Supreme Court perceived the issue to be simply one of state procedural law unaffected by federal authority.

The Supreme Court of Oklahoma has developed a rather novel solution to this recurrent problem. In *McLin* v. *Trimble,* 795 P.2d 1035 (Okl. 1990), the Oklahoma Supreme Court was faced with an interesting situation wherein Section 1983 defendants, who had been denied summary judgment based upon qualified immunity, appealed the judgment of the trial court and, in the alternative, requested a writ of prohibition against the trial court. Holding the Supremacy Clause and *Felder, supra,* mandated some sort of appellate review, the Oklahoma Supreme Court, nonetheless, refused to abdicate its state rule on final orders and permitted review *only* by extraordinary writ.

The fallacy of such a "compromise" procedure was demonstrated in a well reasoned dissent filed with a subsequent Oklahoma decision. In *Lambert* v. *Town of*

Stringtown, 834 P.2d 955 (Okl. 1992), the Oklahoma Supreme Court summarily dismissed an appeal from a summary judgment based on qualified immunity in a Section 1983 action because the defendants did not make an alternative request for extraordinary relief by way of a writ of prohibition. Chief Justice Opala dissented and asserted such an appeal was required as a matter of substantive federal law under *Mitchell* v. *Forsyth, supra.* More importantly, the Chief Justice argued the utilization of extraordinary writs was an ill conceived substitute for ordinary appellate review and stated:

> The course chosen by the court's opinion—that of providing corrective relief by original actions invoking our writ power—would not assure *consistent* and *orderly process* uniformly extending the remedy of appellate review *to all like or similarly situated public officials.* (Original emphasis). *Lambert, supra,* at p. 959.

It is implicit in Chief Justice Opala's dissent that his argument against the use of extraordinary writs as leading to inconsistent determinations replicates this Court's outcome determinative rationale set forth in *Felder, supra.* For the very reasons argued by Chief Justice Opala, which conform to this Court's determination in *Felder* that outcome determinative procedures are precluded by the Supremacy Clause, Petitioner submits the use of extraordinary writs is an unsuitable substitute for the immediate appeal mandated by *Mitchell* v. *Forsyth, supra.*

The foregoing decisions of state appellate courts patently show the inconsistent and aberrant manner the states have treated qualified immunity appeals in state court Section 1983 litigation. New Hampshire, Massachusetts, Minnesota, Maine, Alabama, Iowa and Arkansas all explicitly recognize the right of appeal but only New Hampshire has specifically adopted the *Mitchell* v. *Forsyth* rationale. Those states not permitting appellate review of interlocutory qualified immunity orders include, Illinois, Ohio, Iowa and, of course, Kentucky. Texas refused to grant such an appeal until its state legislature enacted a specific statute dealing

with *state immunities.* Oklahoma's method of review is more aberrant since it specifically denies an actual appeal but will review the issue if brought in the form of an extraordinary writ in the appropriate appellate court. Those states which decline to review the denial of qualified immunity have done so due to the absence of a specific state collateral order rule which permits appellate review of interlocutory orders.

The outcome-determinative effect of the absence of state procedural rules permitting appeals from interlocutory orders denying qualified immunity, is a patent violation of the Supremacy Clause under the *Felder* rationale. The Supremacy Clause would have little meaning if only specific state statutory enactments violative of its provisions were pre-empted by federally created rights. The effective denial of a Section 1983 defendant's immunity from suit by the absence of a state procedural rule permitting interlocutory appeals frustrates the defendant's federal right in this regard just as surely as if the state enacted a specific statute precluding such appellate review. The outcome-determinative effect of either scenario is identical and *Felder* teaches that outcome-determinative state imposed procedures are pre-empted by federal rights protected under Supremacy Clause.

In the instant case, the Kentucky courts initially refused to follow the federal law of qualified immunity and compounded its violation of the Supremacy Clause by refusing to hear the instant Petitioner's appeal because of the absence of a specific collateral order rule.[12] Decisions of other state appellate courts demonstrate Kentucky's treat-

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[12]It is critical to note at this juncture that the Kentucky Supreme Court, on at least one occasion, has reviewed an interlocutory order. In *Murty Bros. Sales, Inc.* v. *Preston,* 716 S.W.2d 239 (Ky. 1986), the Supreme Court, in a joint venture dispute, reviewed an interlocutory order of sale permitting one of the parties to sell partnership assets consisting of thoroughbred horses although the Kentucky Court of Appeals had dismissed

(footnote continued on next page)

ment is not an isolated situation and there is manifest inconsistency among the states in their treatment of appeals from interlocutory qualified immunity orders. Petitioner submits the rationale of *Felder* and the Supremacy Clause preclude states from using their own procedural rules, or lack thereof, to frustrate defendant's qualified immunity rights embodied Section 1983. Therefore, it is incumbent upon this Court to exercise its writ of certiorari power under 28 U.S.C. Section 1257(A) and remedy this state court systemic violation of Section 1983 defendants' immunity rights.

CONCLUSION

Petitioner recognizes and appreciates the limited resources of this Honorable Court and the fact the exercise of its certiorari jurisdiction is a rare occurrence and granted only to determine the most significant issues of national import. Petitioner submits the instant matter fits squarely within this small number of cases because his plight is one which is shared by a great number of defendants in state court 1983 litigation as proven by the state appellate deci-

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(Continued from preceding page)

the original appeal. Relying on Kentucky Rule of Civil Procedure 54.01 relating to final and appealable judgments, the Kentucky Supreme Court opined the order of sale, although interlocutory in nature, nonetheless finally determined the rights of the parties and was reviewable on appeal. The Kentucky Supreme Court explained the distinction as follows:

> The distinction between interlocutory and final orders cannot be premised merely on the basis of whether the order authorizes a sale of various assets. The key to deciding whether the present order was subject to appeal is found in the language of an old case, [citation omitted], wherein our Court included within the definition of a final, appealable order one which "operates to divest some right in such a manner as to put it out of the power of the court making the order . . . to place the parties in their original condition." *Murty Bros. Sales, supra*, at p. 241.

Although Kentuckians are renowned for their love of thoroughbred horses, Petitioner asserts the federal substantive right of qualified immunity should be no less important to the Kentucky appeallate courts than the sale of thoroughbreds.

sions cited in this Petition. When the 1871 Congress enacted the forerunner of 42 USC Section 1983, it incorporated certain inviolate common law immunities consistent with the remedial purpose of the statute, including qualified immunity for police officers, *Owen* v. *City of Independence, supra. Mitchell* v. *Forsyth, supra,* teaches such immunity is a federal substantive right and an immunity from suit. An integral part of that immunity is the right of immediate appeal from an adverse decision on its entitlement or the immunity is forever lost if the defendant is forced to a trial on the merits before appellate review is had. *Id.*

The Supremacy Clause and principles of federalism dictate that state procedural rules which frustrate federally created rights are pre-empted by federal law on the issue. Further, whether the relevant state law is substantive or procedural is immaterial and any state statute or procedural rule which is outcome determinative—i.e., leads to a differing result in state court than that which would be obtained in a federal court hearing the same federal cause of action—is pre-empted by the Supremacy Clause. *Felder, supra.*

Petitioner acknowledges he is presenting a question slightly different than the Supremacy Clause cases previously decided by this Court. Rather than having been deprived of a federally created right pursuant to a state statutory or procedural enactment, Petitioner's federal right of immunity from suit and his integral right of appeal therefrom has been frustrated by the *absence* of a specific Kentucky collateral order rule. Nonetheless, if the Supremacy Clause and principles of federalism are to have any meaning at all as explained in the *Felder* decision, this Court must interpret the Supremacy Clause to apply whether a federally created right is denied by cific statutory enactment or the absence of one when the adverse effect on the federal right is identical.

Nor should the fact Petitioner seeks to enforce federally created rights for section 1983 defendants rather than plaintiffs have any relevance to the application of the Su-

premacy Clause in this matter. It is beyond cavil that the Constitution and the laws of the United States must be equally applied to all citizens. The Supremacy Clause does not categorize rights based on a litigant's interest and protects all rights secured by the Constitution and laws of the United States. Thus, the federal right of qualified immunity for defendants embodied in Section 1983 is equally enforceable through the Supremacy Clause as are plaintiffs' remedial rights under the statute. If the Supremacy Clause precludes states from imposing procedural impediments to plaintiffs' Section 1983 claims brought in state courts, then state procedural rules, or the absence thereof, are similarly pre-empted by the substantive federal immunity rights of Section 1983 defendants. When state court appellate procedures effectively deny Section 1983 defendants the full enforcement of their immunity right by refusing to grant immediate appellate review, the Supremacy Clause becomes hollow words rather than hallowed law.

Based on the foregoing authorities and arguments, Petitioner respectfully requests this Court to grant the instant Petition for Writ of Certiorari to the Kentucky Court of Appeals and hold the Supremacy Clause of the United States Constitution, Article VI, Clause 2, requires the Kentucky appellate courts, as well as the courts of the various states, to provide a uniform appellate review of interlocutory orders of state trial courts denying qualified immunity to Section 1983 defendants in conformity with this Court's decision in *Mitchell* v. *Forsyth, supra.*

Respectfully submitted,

N. SCOTT LILLY
First Assistant Jefferson County Attorney
1001 Fiscal Court Building
Louisville, Kentucky 40202
(502) 625-6336
Counsel of Record for Petitioner

APPENDIX

91-CA-2148-MR

COURT OF APPEALS OF KENTUCKY

JOHN PELUSO, ETC. - - - - - - - - - *Appellant*

v.

RONNIE ALLEN, ET AL. - - - - - - - - *Appellees*

Appeal From Jefferson Circuit Court
Action No. 85-CI-1356

ORDER DISMISSING APPEAL

BEFORE: LESTER, Chief Judge; EMBERTON and WILHOIT, Judges

On December 13, 1991, the Court directed appellant to show cause why this appeal should not be dismissed as having been taken from a nonfinal, nonappealable order. Having considered the response thereto, the Court is of the opinion that appellant has not shown cause.

This appeal is taken from an opinion and order entered August 12, 1991 denying the motion of defendant/appellant for summary judgment. The order fails to dispose of any claims in the action and is, therefore, interlocutory and not appealable. CR 54.01.

Appellant's argument is that, when a § 1983 action is brought in state court, federal law should apply. This statement is correct only to the extent that federal substantive law controls such action. However, state court procedure governs all actions filed in state court and this

Court is bound to follow state court rules of practice and procedure. Pursuant to KRS 22A.020(2), this Court "has jurisdiction to review interlocutory orders of the circuit court in civil cases, but only as authorized by rules promulgated by the Supreme Court." Since the Supreme Court has not promulgated any rules allowing for an appeal of this type, this Court has no jurisdiction to hear it. Based upon the foregoing, it is hereby ORDERED, on the Court's own motion, that the above-captioned appeal be DISMISSED.

/s/ CHARLES B. LESTER
Chief Judge, Court of Appeals

ENTERED: February 3, 1992

No. 85CI-01356
85CI-01958
85CI-01959
85CI-01392

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

RONNIE ALLEN, and
CATHERINE H. ALLEN, ET AL. - - - - *Plaintiffs*

v.

LOUISVILLE GAS & ELECTRIC CO., ET AL. - *Defendants*

OPINION AND ORDER—Entered August 12, 1991

The defendant, John Peluso, Jefferson County Police Officer, seeks summary judgment on the issue whether or not he has a qualified immunity on the claim against him under the 1983 U.S.C. The suit also asserts claim for malicious prosecution; invasion of privacy and outrageous conduct.

The suit was filed March 12, 1985 and consolidated with others. On December 20, 1988, an agreed order dismissing, settled was entered, excepting the claims by plaintiffs against defendants, Black and Peluso, which were reserved.

On the issue of qualified immunity, defendant relies on cited authority of *Harlow* v. *Fitzgerald,* 102 S.Ct. 2727, and *Anderson* v. *Creighton,* 107 S.Ct. 3034.

This action, filed in a State court, is subject to proceedings governing such court and not Federal rules of procedure. As to summary judgment, this was dealt with in

Steelvest, Inc. v. *Scansteel Service Center,* Ky., 807 S.W.2d 476.

A review of these cases shows a genuine and substantial issue of material facts existing that would bar summary judgment at this stage.

Furthermore, there is no showing that the cited Federal authorities regarding immunity for police apply to this State.

For reasons stated, defendants' motion for summary judgment is Denied.

/s/ J Mudd
Judge Jack E. Mudd

Dated: July 8, 1991

cc: C. Michael Hatzell
Attorney for Plaintiffs
Raymond J. Naber, Jr.
Attorney for Defendants

No. 91-CA-2148-MR

COURT OF APPEALS OF KENTUCKY

JOHN PELUSO, Former Jefferson County Police Officer - - - - - - - - *Appellant*

v.

RONNIE ALLEN, ET AL. - - - - - - - *Appellees*

Appeal From Jefferson Circuit Court
Action No. 85-CI-1356

ORDER—Entered March 30, 1992

BEFORE: LESTER, Chief Judge; EMBERTON and WILHOIT, Judges.

Having considered appellant's motion to reconsider order dismissing appeal, to which no response was filed, and being otherwise sufficiently advised, the Court ORDERS the motion be DENIED for the reasons stated in this Court's February 3, 1992 order.

/s/ Anthony M. Wilhoit
Judge, Court of Appeals

92-SC-294-D
(91-CA-2148-MR)

SUPREME COURT OF KENTUCKY

JOHN PELUSO - - - - - - - - - *Movant*

v.

RONNIE ALLEN, ET AL. - - - - - *Respondents*

Jefferson Circuit Court
85-CI-1356

ORDER DENYING DISCRETIONARY REVIEW

—Entered June 17, 1992.

The motion for review of the decision of the Court of Appeals is denied.

/s/ Robert F. Stephens
Chief Justice

No. 85CI-01959

JEFFERSON CIRCUIT COURT

ROBERT W. ALLEN
2707 South 7th Street
Louisville, Kentucky 40215
and
WILLIAM R. SMITH
731 Main Street
Louisville, Kentucky - - - - - - - *Plaintiffs*

v.

LOUISVILLE GAS & ELECTRIC COMPANY
311 West Chestnut Street
Louisville, Kentucky 40202
SERVE: W. W. HANCOCK, JR.
311 West Chestnut Street
Louisville, Kentucky 40202

v.

JAMES BLACK
c/o Jefferson County Police Department
Hall of Justice
600 West Jefferson Street
Louisville, Kentucky 40202
and
JOHN PELUSO
c/o Jefferson County Police Department
Hall of Justice
600 West Jefferson Street
Louisville, Kentucky 40202 - - - - *Defendants*

COMPLAINT—Filed March 18, 1985

The Plaintiffs, ROBERT W. ALLEN and WILLIAM R. SMITH, are residents of Jefferson County, Kentucky, and state for their cause of action the following:

1.1 The Defendant, LOUISVILLE GAS & ELECTRIC COMPANY, (hereinafter referred to as LG&E) is a Kentucky corporation; JAMES BLACK and JOHN PELUSO, acting under the authority of their office as policemen for the County of Jefferson, Commonwealth of Kentucky, and under the color and pretense of the statutes, ordinances, regulations, customs, and usages of the Commonwealth of Kentucky, the County of Jefferson.

1.2 The Plaintiffs state that the Defendants, JAMES BLACK and JOHN PELUSO, at all times material hereto, were duly appointed, employed, and are acting policemen of Jefferson County, a governmental subdivision of the Commonwealth of Kentucky, and both Defendants are residents of the County of Jefferson.

2.1 The Plaintiffs, for cause of action, state that on or about March 12, 1984, the Defendants, JOHN PELUSO and CAPTAIN JAMES BLACK, acting alone or in concert with each other and/or LG&E, falsely, maliciously, and without probable cause or compliance with jurisdictional requisites, did alone or in concert with other persons and corporations, cause ROBERT W. ALLEN and WILLIAM R. SMITH to be charged with mail fraud in the United States District Court for the Western District of Kentucky, at Louisville, Kentucky.

3.1 The Defendants, LG&E, JAMES BLACK, and JOHN PELUSO, maliciously and without probable cause and for ulterior purpose, acting alone and/or in concert with each other and a corporation, caused said criminal action and caused said ROBERT W. ALLEN and WILLIAM R. SMITH to be indicted for mail fraud, to be brought against said ROBERT W. ALLEN and WILLIAM R. SMITH, and maliciously prosecuted said ROBERT W. ALLEN and WILLIAM R. SMITH in the aforesaid United States District Court to secure for the LG&E Company a collateral or monetary advantage and benefit to said company.

4.1 The acts described in paragraphs 2.1 and 3.1 of this Complaint constitute malicious prosecution, injury to Plaintiffs' reputations, invasion of their privacy, intentional infliction of emotional distress, negligence and outrageous conduct, all in violation of the laws of the Commonwealth of Kentucky.

5.1 This cause of action is brought pursuant to 42 U.S.C. § 1983, 1988, and the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded upon 28 U.S.C. § 1331 and 1343, Sections (1), (2), (3), and (4).

5.2 Defendant, LG&E, did corruptly conspire in concert with JAMES BLACK and JOHN PELUSO, who were acting under authority of their office as policemen for the County of Jefferson, Commonwealth of Kentucky, and under the color and pretense of the statutes, ordinances, regulations, customs and usages of the Commonwealth of Kentucky, and the County of Jefferson, and did cause Plaintiffs, ROBERT W. ALLEN and WILLIAM R. SMITH, to be maliciously and willfully prosecuted without probable cause for mail fraud, as stated in paragraph 2.1 and paragraph 3.1.

5.3 As a result of the acts described in paragraph 5.1 of the Complaint herein, Plaintiffs have suffered deprivation of their liberty, injury to their reputations, invasion of their privacy, mental suffering and pain, all in violation of 42 U.S.C. § 1983, and the First, Fourth, Fifth and Fourteenth Amendments of the Federal Constitution.

6.1 This action is brought pursuant to 42 U.S.C. § 1985, 1988, and the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded upon 28 U.S.C. § 1331 and 1343, Sections (1), (2), (3), and (4).

6.2 Defendant, LG&E, maliciously, and with intent to injure Plaintiffs, conspired with Defendants, JOHN PELUSO and JAMES BLACK, to deprive Plaintiffs of their rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution, and under Federal

law, particularly Title 42 of the United States Code, Section 1985, in causing them to be wrongfully charged with and prosecuted for mail fraud, as stated in paragraph 2.1 and 3.1.

6.3 As a result of the acts described in paragraph 6.1 of this Complaint herein, Plaintiffs have suffered deprivation of their liberty, injury to their reputations, invasion of their privacy, mental suffering and pain, all in violation of 42 U.S.C. § 1985, and the First, Fourth, Fifth, and Fourteenth Amendments of the Federal Constitution.

7.1 The Plaintiffs state that the Defendants, LG&E, JAMES BLACK, and JOHN PELUSO, in an effort to save LG&E monies and prevent financial loss, did with reckless disregard of the probability of causing the Plaintiffs to be held in "false light," thereby causing them emotional distress, and did cause the arrest, trial, and attending general newspaper publication of the Plaintiffs' alleged crimes with intent of discouraging others to cease and desist and refrain from "meter tampering" thus protecting the financial security of LG&E Company, and as a direct and proximate result therefrom, did cause the Plaintiffs, ROBERT W. ALLEN and WILLIAM R. SMITH, to be held in "false light" and great and harmful mental anguish and emotional distress to the Plaintiffs, a direct and proximate result thereof, for which punitive damages should be awarded in the amount of Seven Hundred Fifty Thousand Dollars ($750,000.00).

7.2 Plaintiffs state they were required to employ an attorney at a cost of $5,000.00; they have suffered humiliation, nervous shock, loss of sleep, mental anguish, and were placed in contempt and derision among their friends and acquaintances and their reputations for honesty have been impaired; that they were slated by police officers of this community, they were registered on the criminal docket of the United States District Court, upon the records of the Federal Bureau of Investigation, and of other governmental agencies with information identifying them as persons accused of a crime; that their record will be for the remainder of their lives catalogued with those persons accused of crime

in this community and classified by Federal law enforcement agencies.

8.1 The Plaintiffs state that any employment involving trust fiduciary responsibility, or the licensing of responsible employment, will require the disclosure of this arrest and trial, and if they seek employment wherein a bond is required, or an occupation requiring licensure by a state and the posting of fidelity bond, that their future capacity to obtain such bonds has been impaired and on account thereof, they have been damaged.

9.1 The fact of their said arrest and incarceration has become known among their friends and acquaintances and that the public knowledge of said fact and required disclosure on applications for employment, will hold them in "false light" and will inescapably become known in the future on account of the Defendants' said malicious and unjustified accusations.

10.1 The Plaintiffs state that as a direct and proximate result of the charges against the Plaintiffs, ROBERT W. ALLEN and WILLIAM R. SMITH, they were arrested, held by police, and arraigned in the United States District Court, on motion and sustained by the Court, the case was dismissed. As a direct and proximate result of the criminal proceedings, the Plaintiffs suffered great mental suffering, humiliation, and anguish, all to their damage in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00).

WHEREFORE, the Plaintiff, ROBERT W. ALLEN, prays for the following:

1. Judgment against the Defendants, LG&E, JAMES BLACK, AND JOHN PELUSO, jointly and severally, in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) for compensatory damages and in the amount of Seven Hundred Fifty Thousand Dollars ($750,00.00) for punitive damages; and,

2. Court costs herein expended; and,

3. Right of trial by jury; and,

4. Any and all other relief to which this Plaintiff may be entitled.

WHEREFORE, the Plaintiff, WILLIAM R. SMITH, prays for the following:

1. Judgment against the Defendants, LG&E, JAMES BLACK, and JOHN PELUSO, jointly and severally, in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) for compensatory damages and in the amount of Seven Hundred Fifty Thousand Dollars ($750,000.00) for punitive damages; and,

2. Court costs herein expended; and,

3. Right of trial by jury; and,

4. Any and all other relief to which this Plaintiff may be entitled.

/s/ HARRIET L. ALLEN
Harriet L. Allen
2890 Neal Drive
Lexington, Kentucky 40503
(606) 277-4674
Attorney for Plaintiffs

/s/ W MARVIN
William M. Marvin, by Counsel
1500 Kentucky Home Life Building
Louisville, Kentucky 40202
(502) 584-0291

I have read the foregoing petition and the facts stated therein are true and correct to the best of my knowledge and belief.

/s/ ROBERT W. ALLEN
Robert W. Allen

STATE OF KENTUCKY }
COUNTY OF JEFFERSON } SCT

Subscribed and sworn to before me this 1st day of March 1985, by Robert W. Allen.

My commission expires: 7-23-88.

/s/ Harriet L. Allen
Notary Public, Kentucky
State at Large

I have read the foregoing petition and the facts stated therein are true and correct to the best of my knowledge and belief.

/s/ William R. Smith
William R. Smith

STATE OF KENTUCKY }
COUNTY OF JEFFERSON } SCT

Subscribed and sworn to before me this 1st day of March 1985, by William R. Smith.

My commission expires: 7-23-88.

/s/ Harriet L. Allen
Notary Public, Kentucky
State at Large

No. 85CI-1356
Under Consolidation: 85CI-1392
85CI-1958
85CI-1959

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

RONNIE ALLEN, ET AL. - - - - - - - *Plaintiffs*

v.

LOUISVILLE GAS & ELECTRIC CO., ET AL. - *Defendants*

AFFIDAVIT OF RICHARD DENNIS

The Affiant, Richard Dennis, after first being duly sworn, states as follows:

1. That he is presently, and has been since 1982, an Assistant United States District Attorney for the Western District of Kentucky.

2. That in approximately November, 1982, Affiant met with Special Agent, Robert Bortner, of the Louisville office of the Federal Bureau of Investigation, Captain James Black, and Officer John Peluso of the Jefferson County Police Department.

3. During the aforementioned meeting, Affiant was advised by the participants that first James Allen in concert with his wife Wanda Allen, and later Franklin Allen and Pamela Allen, in concert with one named Doris M. Beyer, John Seay, Robert Allen, William R. Smith, and Ronnie Allen and his wife, Catherine Allen had requested John Peluso to "roll back" electric meters at their personal resi-

dences, as well as at property operated as businesses by them in Jefferson County, Kentucky, and serviced by Louisville Gas and Electric Company.

4. That upon learning the above information, Affiant requested that the investigation continue.

5. That Affiant held further meetings early in 1983 with Captain James Black and with Special Agent Bortner, the purpose of which was to be advised as to the progress and status of the undercover investigation of the Jefferson County Police Department and the Federal Bureau of Investigation.

6. During the meetings held and previously mentioned, the Affiant was informed that at certain times; and at the request of Ronnie Allen and Catherine Allen; James Allen and Wanda Allen; Robert W. Allen; William R. Smith; Frank Allen and Pamela Allen; and John Seay and Doris Beyer, Officer Peluso had rolled back electric power meters.

The addresses for some are as follows:

Ronnie Allen and Catherine Allen
4404 Eden Lane
Louisville, Kentucky

James Allen
Murphy's Bar & Lounge
3212 Seventh Street Road
Louisville, Kentucky

Robert Allen and William Smith
The New Orleans Club
3524 Seventh Street Road
Louisville, Kentucky

and

The Green Light Lounge
3503 Seventh Street Road
Louisville, Kentucky

Frank Allen and Pamela Allen
1322 Lydia
Louisville, Kentucky (Frank Allen)

and

Greenlight, Inc.
2512 Seventh Street Road
Louisville, Kentucky

Doll House Lounge
2515 Seventh Street Road
Louisville, Kentucky

7. Affiant continued to meet concerning the investigation; continued to be advised of the facts and developments, and continued to render legal advice.

8. Upon final review of the data as collected by the investigators and after a careful review of the statutes, Affiant made the determination to submit these data matters to the United States Grand Jury.

9. During the sessions of the Grand Jury that heard these matters, Special Agent Robert Bortner, was the sole witness. In each case he testified based upon materials provided to him in the course of the regular investigation.

10. That upon presentation of the evidence the Grand Jury returned indictments as follows:

CR 83-00082-01-L	Ronnie Louis Allen Catherine H. Allen Two (2) Counts
CR 83-00085-L	Robert W. Allen William R. Smith Three (3) Counts
CR 83-00083-L	Franklin D. Allen Six (6) Counts Doris Beyer (not a Plaintiff) Four (4) Counts Pamela Allen Two (2) Counts
CR 83-00086-L	James Edward Allen Wanda Allen (not under consolidation) Four (4) Counts
CR 83-0084-L	John Seay Two (2) Counts

11. The indictments against Ronnie Louis Allen and Catherine Allen were filed on August 17, 1983 and were dismissed on October 19, 1983, due to the fact that Officer Peluso was in training and unavailable. Thereafter, upon my legal advice, the matters were resubmitted to the Grand Jury and the above were reindicted on January 19, 1984.

On February 22, 1984, United States District Judge Edward Johnstone dismissed the superseding indictments under F.R.Cr.P. 48(b)1.

12. The indictments against Robert W. Allen and William R. Smith were filed on August 17, 1983, and were dismissed on October 19, 1983, due to the fact that Officer Peluso was in training and unavailable. Thereafter, upon my legal advice, the matters were resubmitted to the Grand Jury and the above were reindicted in mid January, 1984.

On March 7, 1984, the above Defendants were tried by jury and the jury failed to reach a verdict as to Robert Allen, and a mistrial was declared. The United States elected to withdraw its intent to prosecute a retrial on April 17, 1984.

13. The indictments against Franklin and Pamela Allen were filed on August 17, 1983, and were dismissed on October 19, 1983, due to the fact that officer Peluso was in training and unavailable. Thereafter, upon my legal advice, the matters were resubmitted to the Grand Jury and the above were reindicted on January 10, 1984. Also indicted was Doris M. Beyer.

On February 21, 1984, Doris M. Beyer pleaded guilty. Frank Allen and Pamela Allen were tried by a jury. A directed verdict of acquittal was entered on behalf of Pamela Allen and on behalf of Frank Allen on two (2) counts. Frank Allen was not convicted on such charges by the jury on February 23, 1984, and the indictments were dismissed.

14. The indictments against James Allen and Wanda Allen were filed on August 17, 1983, and were dismissed on October 19, 1983, due to the fact that Officer Peluso was in training and unavailable. Thereafter, upon my legal advice, the matters were resubmitted to the Grand Jury and James Allen and Wanda Allen were reindicted in mid January, 1984.

On March 19, 1984, James Allen was tried by jury and the jury failed to reach a verdict. Wanda Allen was acquitted. The indictment was dismissed on April 17, 1984, when the United States withdrew its motion for retrial.

15. John Seay was indicted on August 17, 1983, and pled guilty on October 28, 1983. Mr. Seay received a sentence of one (1) year imprisonment and a total fine of $1,000.00. Execution of imprisonment was suspended and the Defendant was placed on probation for one (1) year; a special condition of probation was that the Defendant make restitution in the amount of $400.57.

16. To my knowledge, no information was withheld by John Peluso and James Black. To my knowledge no relevant factual material which was provided proved to be false.

17. Based upon the receipt of the factual material, I rendered legal advice and continued prosecution of the Plaintiffs in these actions and followed through with the prosecutions to their conclusions.

18. At no time during the entire transaction was it evident to me that any officer or corporation participating in the investigation did so for any purpose other than to bring to justice the persons whom the perceived to have committed crimes.

19. Further, Affiant sayeth not.

/s/ Richard Dennis
Richard Dennis, Affiant

STATE OF KENTUCKY }
COUNTY OF JEFFERSON } SS:

Subscribed and sworn to before me by Richard Dennis, Affiant on this 3rd day of December, 1986.

My Commission expires: July 11, 1988.

/s/ Connie C. illegible a/k/a Connie Coffman
Notary Public, State at Large

No. 85CI-01356
85CI-01958
85CI-01959
85CI-01392

JEFFERSON CIRCUIT COURT
SIXTH DIVISION

RONNIE ALLEN, and
CATHERINE H. ALLEN, et al. - - - - - *Plaintiffs*

v.

LOUISVILLE GAS & ELECTRIC CO., et al. - *Defendants*

NOTICE OF APPEAL—Filed September 11, 1991

John Peluso, former Jefferson County Police Officer, the Defendant herein, appeals to the Kentucky Court of Appeals from an Opinion and Order signed in the above styled matter on July 8, 1991 but not entered until August 12, 1991 in favor of the Plaintiff denying Defendant's Motion for Summary Judgement based upon the legal issue of qualified good faith immunity which is a legal issue which Defendant is entitled to have reviewed on appeal prior to trial.

/s/ Raymond J. Naber, Jr.
Raymond J. Naber, Jr.
Naber, Joyner, Schardein & Stinson
Suite 1551, Starks Building
455 South Fourth Avenue
Louisville, Kentucky 40202
(502) 583-3081

CERTIFICATE

I hereby certify that a true copy hereof was mailed to Michael Hatzell, Attorney for Plaintiffs, Suite 704, 1 Riverfront Plaza, Louisville, Kentucky 40202, this 11th day of September, 1991.

/s/ Raymond J. Naber, Jr.
Raymond J. Naber, Jr.

No. 91-CA-2148-MR

COURT OF APPEALS OF KENTUCKY

JOHN PELUSO (Former Jefferson County Police Officer) - - - - - - - - *Appellant*

v.

RONNIE ALLEN;
CATHERINE H. ALLEN;
LOUISVILLE GAS & ELECTRIC COMPANY - - - *Appellees*

Appeal From Jefferson Circuit Court
Action No. 85-CI-1356

ORDER—Entered December 13, 1991

It appears to this Court, upon initial screening of this case, that the order appealed from may not be final and appealable. If so, the Court must dismiss this appeal pursuant to *Hook* v. *Hook*, Ky. 563 S.W.2d 716 (1978).

The Jefferson Circuit Court denied appellant's motion for summary judgment on August 12, 1991. This appeal is taken from that order which fails to dispose of any claims in this action and is, therefore, interlocutory and not final or appealable. CR 54.01.

Therefore, the appellant is hereby given ten (10) days from the date of entry of this Order to SHOW CAUSE, if any there be, why this appeal should not be dismissed as having been taken from a nonfinal, nonappealable order. Responses to this order shall be filed in quintuplicate.

/s/ Charles B. Lester
Chief Judge, Court of Appeals

No. 91-CA2148-MR

COURT OF APPEALS OF KENTUCKY

JOHN PELUSO (Former Jefferson County Police Officer) - - - - - - - - *Appellant*

v.

RONNIE ALLEN;
CATHERINE H. ALLEN;
LOUISVILLE GAS & ELECTRIC COMPANY - - - *Appellees*

APPELLANT'S RESPONSE TO SHOW CAUSE ORDER ENTERED DECEMBER 13, 1991

Comes the Appellant, by counsel, and respectfully submits the following response to the Show Cause Order dated December 13, 1991.

FACTUAL BACKGROUND

Appellees filed an action in Jefferson Circuit Court seeking to impose liability upon a member of the Jefferson County Police Force under 42 U.S.C. Section 1983 as well as state tort claims. The Appellant below filed a summary judgment motion seeking a dismissal of the Appellee's Complaint on the grounds that he is immune under principles of sovereign immunity. The Circuit Court denied the summary judgment motion on August 12, 1991, and an appeal was taken from that Order. This Court requests Appellant to show cause why this Appeal should not be dismissed as it appears to have been taken from an interlocutory and not a final or appealable order under CR 54.01.

ARGUMENT

This is a 42 U.S.C. Section 1983 action against a police officer filed in state court. Although the action is in state court, the rights asserted under 42 U.S.C. Section 1983

are subject to federal case law defining such rights. *Mitchell* v. *Forsyth*, 472 U.S. 511, 86 L.Ed.2d 411, 105 S.Ct. 2806 (1980) holds that the defense of qualified good faith immunity may be raised at any time. It is an entitlement that is an *immunity from suit* rather than a mere defense to liability and it is effectively lost if a case is erroneously permitted to go to trial. Therefore, any order with respect to qualified good faith immunity is a final and appealable order.

In addition, when a state court entertains a Section 1983 action, the court must follow the federal definition of the cause of action and cannot construe Section 1983 differently because the action is in state and not federal court. Steinglass, *The Emerging State Court Section 1983 Action: A Procedural Review*, 38 Univ. of Miami L. Rev. 381 (1984) p. 449. The state court must define the scope and nature of Section 1983 and disregard state policies inconsistent with that federal definition. *Id.* at 454.

The court in *Martinez* v. *California*, 447 U.S. 277, 62 L.Ed.2d 481, 1001 S.Ct. 553 (1980), noted that state courts are generally not free to refuse enforcement of federal claims if the same type of state law claims are enforced in their court. Therefore, when a Section 1983 action is brought in state court, federal law should apply.

For the foregoing reasons, Appellant respectfully submits that this Court should retain this matter on its docket for a review of the Circuit Court's order overruling Appellant's Motion for Summary Judgment. Further, it should be noted that as far as counsel for either party can determine, this is a case of first impression for the Commonwealth.

Respectfully submitted,

/s/ Raymond J. Naber, Jr.
Raymond J. Naber, Jr.
Assistant Jefferson County Attorney
Attorney for Appellant
Suite 1551 Starks Building
Louisville, KY 40202
(502) 583-3081

CERTIFICATE

I hereby certify that a copy of the foregoing Response was mailed this 23rd day of December, 1991, by first-class mail, postage prepaid, to C. Michael Hatzell, One Riverfront Plaza, Louisville, Kentucky 40202.

/s/ Raymond J. Naber, Jr.
Raymond J. Naber, Jr.

No. 91-CA-2148-MR

COURT OF APPEALS OF KENTUCKY

JOHN PELUSO, ETC. - - - - - - - - - *Appellant*

v.

RONNIE ALLEN, et al. - - - - - - - - - *Appellees*

MOTION TO RECONSIDER ORDER DISMISSING APPEAL PURSUANT TO CR 76.38

On February 3, 1992, this Honorable Court entered an Order dismissing the above styled appeal which sought review of the Trial Court's denial of John Peluso's (Appellant) summary judgment motion based on Peluso's qualified immunity from the Appellee's 42 U.S.C. Section 1983 suit filed in the Jefferson Circuit Court. In that Order, the Court recognized that federal substantive law controls Section 1983 actions in state court but, contrary to clear federal authority, held the use of the summary judgment mechanism in relation to the qualified immunity issue is a procedural matter governed by state rules.

The Appellant Peluso respectfully suggests this Court misapprehends the contours of the qualified immunity available to Section 1983 defendants. It is an immunity from *suit*, not a mere defense, and it is clearly a federal substantive right controlled by federal case law which mandates enforcement of the immunity through summary proceedings and appellate review. Simply stated, if a defendant is denied an immediate review of an adverse ruling on qualified immunity, that defendant has been denied a substantive right, created by federal law, to be free from the burden of litigation. In other words, a defendant can't protect his right of immunity from suit; indeed, has no immunity whatsoever; if he is forced to try the underlying

case *before* there is an appellate review of the qualified immunity issue.

As succinctly stated in a number of United States Supreme Court cases beginning with the bedrock case of *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), and more recently restated in *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985):

> *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. *The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.* (Emphasis added).

See, also, *Seigert* v. *Gilley*, 500 U.S. ___, 114 L.Ed.2d 277, 111 S.Ct. ___ (1991).

As correctly noted by this Court, federal substantive law accompanies federal actions brought in state court and, in that regard, the elements of, and the defenses to, a federal cause of action are defined by federal law. *Howlett* v. *Rose*, 496 U.S. ___, 110 L.Ed.2d 332, 110 S.Ct. ___ (1990). While it is also true that the various states may establish the rules of procedure governing litigation in their own courts, "[b]y the same token, however, where state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.' " *Felder* v. *Casey*, 487 U.S. 131, 138 (1988), citing in part, *Brown* v. *Western R. Co. of Alabama*, 338 U.S. 294, 296 (1949). Consequently, the United States Supreme Court has clearly mandated state courts apply federal substantive law to the exclusion of state law or procedural rules which may conflict with the federally created elements or defenses of the cause of action.

Here, Peluso's qualified immunity, an immunity from suit, is an integral part of the federal substantive law of Section 1983 actions and the Kentucky courts must accept appellate jurisdiction where a circuit court has entered a final decision denying qualified immunity or the federally

created right of qualified immunity would be " . . . defeated by the forms of local practice." *Felder, supra.* It should also be noted the Sixth Circuit, in construing the contours of qualified immunity and applicable Supreme Court decisions, has recognized the denial of qualified immunity is a final decision appealable at that juncture; *Daugherty* v. *Campbell,* 935 F.2d 780 (6th Cir. 1991).

Therefore, based on the foregoing federal authority and argument, it is Peluso's position that the Jefferson Circuit Court's denial of his summary judgment motion based on qualified immunity is a final order with respect to a federally created substantive right in a Section 1983 action and it is incumbent upon the Kentucky Court of Appeals to review this decision in accord with incontrovertible United States Supreme Court decisions on the issue. Otherwise, Section 1983 defendants' substantive rights, scrupulously protected by the federal courts, would be defeated by the procedural forms of Kentucky practice. For these reasons, Appellant respectfully requests the Court to reconsider its February 3 Order dismissing the above styled appeal, reinstate the appeal and set a briefing schedule for the parties on the issue of Appellant's qualified immunity.

Respectfully submitted,

/s/ _____

Raymond J. Naber, Jr.
Assistant Jefferson County Attorney
Attorney for Appellant
Suite 1551 Starks Building
Louisville, KY 40202
(502) 583-3081

CERTIFICATE

I hereby certify that a copy of the foregoing Motion to Reconsider was mailed this ___ day of February, 1992, by first-class mail, postage prepaid, to C. Michael Hatzell, One Riverfront Plaza, Louisville, Kentucky 40202.

/s/ _____

Raymond J. Naber, Jr.

File No. _____

SUPREME COURT OF KENTUCKY

JOHN PELUSO (former Jefferson County Police Officer) - - - - - - - - - - *Movant*

v.

RONNIE L. ALLEN, et al. - - - - - - *Respondents*

MOTION FOR DISCRETIONARY REVIEW

Comes John Peluso, by and through the office of the Jefferson County Attorney, pursuant to KRS 387.560(3), and as its Motion for Discretionary Review, pursuant to CR 76.20, respectfully submits the following:

1. The name of the Movant is John Peluso, by Mike Conliffe, Jefferson County Attorney, through Raymond J. Naber, Jr., Assistant Jefferson County Attorney, Suite 1551 Starks Building, Louisville, Kentucky 40202.

2. The name of the Respondents are Ronnie L. Allen, Robert W. Allen, William R. Smith, Catherine H. Allen, Pamela Allen, Frank Allen and James Allen represented by C. Michael Hatzell, One Riverfront Plaza, Louisville, Kentucky 40202.

3. The Order of the Court of Appeals was entered on March 30, 1992, denying Movant's Petition for Reconsideration from the Court's Order of February 3, 1992. The judgment of the Jefferson Circuit Court appealed from was entered on July 8, 1991. Copies of these orders are attached hereto.

4. A supersedeas bond has not been executed since there has been no monetary award in the judgment for which discretionary review is sought.

5. Neither Movant nor any other party has any petition for hearing or motion for rehearing pending in the Kentucky Court of Appeals.

STATEMENT OF FACTS

An action pursuant to 42 USC Section 1983 was brought in Jefferson Circuit Court against the Defendant, John Peluso, a Jefferson County Police Officer in connection with a criminal investigation. Several state law claims were also brought against Defendant for malicious prosecution, invasion of privacy and outrageous conduct. A multitude of suits were filed in early 1985, and all were consolidated shortly after filing except one, trial of which returned a verdict for Defendant. On December 20, 1988, an Agreed Order Dismissing Settled was entered which reserved Plaintiffs' claims against Defendant Peluso. Peluso sought a summary judgment on the basis of the legal defense of qualified immunity on the Section 1983 claim only as such defense relates only to claims of violations of 42 USC Section 1983. Summary judgment was also sought on the state claims but not by use of the legal defense of qualified immunity as it does not apply to those claims.

The Circuit Court did not review the evidence and made no findings of fact in its Opinion and Order dated July 8, 1991 (copy attached as Exhibit "A") wherein the Circuit Court denied Defendant's Summary Judgment Motion. Defendant's appeal to the Kentucky Court of Appeals was dismissed by Order dated February 3, 1992 (copy attached as Exhibit "B"). Defendant's Motion to Reconsider was denied by Order dated March 30, 1992 (copy attached as Exhibit "C").

REASONS FOR REVIEW

Claims under 42 USC Section 1983 may be brought in either federal or state courts. This case makes manifest the need for the Supreme Court of Kentucky to exercise its supervisory role to direct the Courts of this Commonwealth in the correct disposition of these federally created statutory claims.

It is clear from the attached orders that the Jefferson Circuit Court and the Kentucky Court of Appeals believe

that a summary judgment motion is a matter of procedural rather than substantive law and therefore state courts are not obliged to adhere to federal law.

United States Supreme Court has made it clear that qualified immunity in Section 1983 actions *is an immunity from suit* which is a substantive right and not merely a procedural matter. *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982); *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985); and *Seigert* v. *Gilley*, 500 U.S. ___ (1991). This substantive right has unquestionably been denied Defendant Peluso by the actions of the courts below in their misapprehension of the applicability of federal law.

CONCLUSION

The Kentucky Supreme Court must exercise its supervisory role to insure that the Courts of the Commonwealth correctly dispose of federally created statutory rights under 42 USC Section 1983.

Respectfully submitted,

Michael J. Conliffe,
Jefferson County Attorney
By: /s/ Raymond J. Naber, Jr.
Raymond J. Naber, Jr.
Assistant Jefferson County Attorney
Suite 1551 Starks Building
Louisville, KY 40202
(502) 583-3081

CERTIFICATE

I hereby certify that a copy of the foregoing Motion for Discretionary Review was this 11th day of April, 1992, mailed by first-class mail, postage prepaid, to C. Michael Hatzell, One Riverfront Plaza, Louisville, Kentucky 40202, Counsel for Respondents; Hon. John C. Scott, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Jack Mudd, Judge, Jefferson Circuit Court, Hall of Justice, 600 West Jefferson Street, Louisville, Kentucky 40202; and to the Hon. Dan Schneider, Judge, Jefferson District Court, Hall of Justice, 600 West Jefferson Street, Louisville, Kentucky 40202.

/s/ Raymond J. Naber, Jr.
Raymond J. Naber, Jr.